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No. 83-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF TEXAS,
Appellant
v.
KVUE-TV, INC., *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF A PLENARY HEARING

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QUESTIONS PRESENTED

1. Whether it is constitutional, under the Tenth Amendment, for the federal government to preempt a state's regulation of its own political and electoral processes.

2. Whether the Federal Election Campaign Act of 1971 preempts state regulation of advertising rates charged by radio and television stations in connection with state and local candidates and issues.

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INTEREST OF THE AMICI

The *amici* are organizations which represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in legal questions affecting such governments. Constitutional and statutory questions of great importance for the political and electoral processes of state and local governments are presented by this case. *Amici* are therefore submitting this brief to assist the Court in its consideration of the questions raised by this litigation.[1]

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief.

STATEMENT

1. In 1975 the State of Texas enacted the Texas Election Code. Article 14.09 of that code was designed to promote an informed electorate. The article does so in two ways. First, Article 14.09(B) encourages access to the media by preventing radio and television stations from charging more for political advertising than the lowest rates they charge for other advertising. Article 1409 (B) applies year-round, and is applicable whether political advertising concerns a political candidate or a political issue.

Second, Article 14.09(A) requires disclosure of the name and address of the principal or agent contracting for political advertising, and requires the ad to state that it *is* political advertising. Article 1409(A), like 14.09(B), applies whether an ad relates to a political candidate or a political issue.[2]

2. In late 1981 station KVUE (appellee) brought suit challenging Article 14.09. The district court dismissed for lack of standing, but the Court of Appeals for the Fifth Circuit reversed. After finding that KVUE possesses standing, the court struck down the advertising rate provisions of Article 14.09(B) in regard to *all* candidates and issues, be they federal, state or local. It also struck down the disclosure requirements of 14.09(A) in regard to federal candidates and issues.

3. The court's decision was based on alleged preemption of the Texas statute by the Federal Election Campaign Act of 1971 (FECA) or regulations promulgated thereunder. However, the opinion did not discuss the nature or extent of any federal constitutional power under which this asserted preemption might occur. Rather,

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[2] Article 14.09(A) is set forth in footnote 2 of the decision below, Appendix to the Jurisdictional Statement (App.), p. A-11, n.2. Article 14.09(B) appears in footnote 1 of the decision below, App. A-10, n.1, and at page 4 of the Jurisdictional Statement.

it only stated cursorily in a footnote that "Congress' power to regulate radio and television broadcasting arises from the power to regulate commerce among the states." App. A-22, n.25.

4. In regard to the advertising rate provisions of 14.09(B), the court conceded that "neither Congress nor the FCC has taken the position that the advertising rate provisions of [FECA] oust states from regulating the price stations may charge for broadcasting political advertising." App. A-29. But the court nonetheless found across-the-board preemption because of differences between the state and federal laws. Under the state law broadcasters are prohibited year-round from charging more for political advertising than the lowest rates they charge for other advertising, and this prohibition is applicable to candidates and others. But the federal law is applicable only for designated periods of time prior to elections and only to candidates.[3] The narrower protections of the federal law, ruled the court, oust the state law even in connection with the state's own electoral processes, because Congress wanted to shorten the "campaign season" and to lessen campaign costs. This Congressional goal, claimed the court, is hindered by a longer period of low advertising rates and by allowing non-candidates to enjoy such rates.

5. Insofar as the disclosure requirements of Article 14.09(A) are concerned, the court admitted that neither the Federal Election Campaign Act (FECA) nor its legislative history shows any intent to preclude all state regulation of political advertising. The court nonetheless found preemption in regard to federal candidates and issues because of actions of the Federal Elections Commission and the Federal Communications Commission. Those two agencies have issued rules regarding disclosure, and

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[3] The federal prohibition applies only for forty-five days before a primary election and sixty days before a general or special election.

have stated that their rules "'preempt any state statute which attempts to impose additional notices on political advertising by federal candidates or committees.'" App. A-27. The disclosure rules of the federal agencies, said the court, are satisfied by disclosure that a political ad is paid for by a particular candidate or committee. App. A-28, n.50. But the state law requires the additional disclosure of the address of the candidate or committee, and a statement that the ad is a paid political announcement. *Ibid.* Thus preemption. Nor was the state statute saved by the fact that it did not preclude compliance with the federal law, but was complementary to it.

6. The court did allow the disclosure requirements of Article 14.09(A) to continue to govern state and local political processes. The court did so because federal agencies had not sought to preempt state disclosure laws in this regard. The Court thus said: "the FCC does not seek to control sponsorship identification by state candidates or committees. The Texas sponsorship requirement is, therefore, valid to the extent that it regulates such advertising concerning state elections and campaigns." App. A-28.

REASONS FOR GRANTING A PLENARY HEARING

The decision below gives rise to highly important questions concerning the fundamental authority of states to regulate their own political and electoral processes. It also is contrary to decisions of this Court regarding state authority. For these reasons, a plenary hearing should be granted.

1. The use of radio and television for presentation of views on candidates and issues is an integral and essential part of our political and electoral processes. Thus, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court remarked the necessity of using the mass media in the political arena. The Court said "[t]he electorate's increasing dependence on television, radio, and other mass media

for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19.

In this case, Texas enacted a law which betters its political and electoral processes by making it less dear for candidates and citizens to use "expensive modes of communications" and by ensuring that sponsorship of political messages is identified. The law promotes the dissemination of political and electoral views and informaiton, and thereby supports and promotes vital First Amendment values.

The crucial advertising rate provisions of this law have been entirely struck down, however: they have been held preempted even as regards the state's own elections and issues. The decision below thus prevents the state from regulating and seeking to better its own processes by promoting the dissemination of information on state and local candidates and issues. Such a decision raises the fundamental question of whether it is constitutional for the federal government to preclude a state from controlling and improving its own political process. *Amici* believe such federal action is *not* constitutional.[4]

2. The authority to regulate its own political processes is a fundamental attribute of each state's sovereignty.

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[4] Texas has not appealed those portions of the decision below which hold its advertising rate and sponsorship identification requirements preempted in regard to *federal* elections and issues. Thus, *amici* will not comment upon those aspects of the decision.

Insofar as the application of the sponsorship identification requirements to state and local elections is concerned, the decision below went in favor of Texas and will not be before this Court unless the matter is raised on cross appeal. *Amici*, however, find it disturbing that the court below upheld the application of those requirements to state candidates and issues only because a federal agency had not sought to preempt such application. Such grudging recognition of state authority bespeaks a jurisprudential view at war with the constitutional power of states to regulate their own political and electoral processes.

Thus, in announcing the Court's judgment that the federal government could not overrule state laws establishing the age for voting in state and local elections, Justice Black said in *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970):

> No function is more essential to the separate and independent existence of the states and their governments than the power to determine . . . qualifications of their own voters . . . and the nature of their own machinery for filling local public offices.

Subsequent to *Oregon v. Mitchell*, in a line of cases beginning with *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court ruled that the Tenth Amendment protects states against exercises of federal power that threaten "functions essential to [the] separate and independent existence" of states, *National League of Cities* at 845, or a "state government's ability to fulfill its role in the Union." *United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982). The Court said it "has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or regulate interstate commerce . . ." *National League of Cities* at 842.

Under *National League of Cities* and its progeny the Court has made clear that there are numerous aspects of state sovereignty which receive Tenth Amendment protection. Such sovereign matters include fire protection, police protection, schools, public health, sanitation, and parks and recreation. *National League of Cities* at 851. Another highly fundamental matter of state sovereignty which necessarily receives Tenth Amendment protection is the right of states to regulate their own political and electoral processes. The necessity of protection for this crucial right is a basic lesson of *Oregon v. Mitchell*, *supra*. See also, *Coyle v. Oklahoma*, 221 U.S. 503 (1911). Protection is also required because the right to regulate

their own political processes is vital to the states' "separate and independent existence" and to their "ability to fulfill [their] role in the Union."

The decision below thus contravenes the Tenth Amendment because it allows federal encroachment upon the fundamental sovereign right of Texas to control and improve its own political processes. Moreover, it stifles Texas' effort to promote first amendment values by increasing the dissemination of information, and prevents the state from "serv[ing] as a laboratory" for efforts to cope with the vast power and influence of broadcast media in the political process. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The stifling of these creative state efforts reinforces the basic illegality of the federal infringement upon the state's prerogative of controlling its own political and electoral processes.[5]

3. The foregoing shows that, as interpreted and applied by the court of appeals, the provisions of FECA are unlawful because they impair the constitutional authority of Texas and are contrary to decisions of this Court. In such circumstances it would have been appropriate for the lower court to construe FECA in a manner that preserves its constitutionality by avoiding preemption of basic state prerogatives. A reasonable, non-preemptive interpretation is readily available, and indeed is mandated by provisions of the federal law.

The lower court admitted, of course, that "neither Congress nor the FCC has taken the position that the advertising rate provisions of [FECA] oust states from regu-

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[5] As noted earlier, the court below did not discuss any constitutional basis for the federal action, but merely made the cursory statement that Congress can regulate radio and television under its interstate commerce power. *National League of Cities*, however, makes clear that Congress' power under the interstate commerce clause does not enable it to infringe vital state functions.

lating the price stations may charge for broadcasting political advertising." App. A-29. This concession is in itself an indication that FECA did not preempt state regulation of advertising rates charged in connection with state and local candidates and issues. Beyond this, however, FECA expressly states only that its provisions have preemptive effect with regard to *federal* office. It provides, 2 U.S.C. § 453:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of state law with respect to election to Federal office.

The Act does *not* say its provisions "preempt any provision of State law with respect to election to Federal *or state* office." Yet Congress surely knew how to say the latter if it had intended such preemption. The lack of the easily made statement demonstrates the lack of preemption.[6]

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[6] The lower court's opinion seeks to elide the difficulties in its position by arguing that the Texas law will give rise to problems or situations which Congress sought to avoid, such as longer "campaign seasons" or greater campaign spending, and may discourage stations from permitting non-federal candidates to advertise. The lower court's assessment of the merits of the situation is plainly debatable, and it is apparent on its face that the Texas legislature takes a different view of the situation than did the court below. Under the Constitution, of course, it is for Texas, not the lower court or Congress, to determine what rules should apply to the state's political and electoral processes in this situation, and to assess the merits of competing views of the effect of differing rules on such matters as length of campaigns, amounts of money spent, and access to the electronic media. Nor does it appear that Congress intended to encroach upon Texas' constitutional prerogative through preemption; as said above, the lower court's finding of preemption is erroneous.

CONCLUSION

As interpreted by the court of appeals, the provisions of FECA infringe the basic constitutional authority of Texas to regulate and improve its own political and electoral processes, and are in conflict with decisions of this Court. Also, the decision below appears incorrect in its analysis of whether FECA in fact preempts the Texas law. The questions raised by the lower court's opinion are of great importance, and this Court should grant a plenary hearing to address them.[7]

Respectfully submitted,

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[7] We note that no problem of standing impedes this appeal. The lower court correctly ruled that KVUE had standing because it had obtained diminished revenue under the statute and, in the absence of decision, would in future either obtain diminished revenue or face the possibility of prosecution. Moreover, now that the lower court's decision has been rendered, a decision by this Court is essential lest the state's law be unenforceable. The law is a criminal statute and, failing reversal by this Court, future defendants could successfully argue that because of the lower court's decision they did not have fair notice that their conduct could be criminally punished.